

March 18, 2013

VIA FEDERAL EXPRESS AND FACSIMILE

The Honorable Jack Dalrymple
Governor of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-0001
Fax: (701) 328-2205

Re: House Bill 1456 and House Bill 1305

Dear Governor Dalrymple:

The Center for Reproductive Rights strongly opposes House Bills 1456 and 1305, and urges you to veto these measures. Further, we urge you to veto the entire package of extreme abortion bans and restrictions on other reproductive healthcare that will shortly be before you. All of these bills are unconstitutional. At least three of the bills (HB 1456, SB 2303, and SB 2305) are intended to almost entirely ban abortion in the state, violating the United States Constitution in the most fundamental and blatant way. These bills would prevent women from accessing critical reproductive healthcare and threaten physicians with criminal penalties for providing standard medical care. In this letter, we will outline the primary policy and constitutional objections to House Bills 1456 and 1305. We will shortly follow up with an additional letter regarding the Senate bills being considered by the House this week.

The Center for Reproductive Rights is a non-profit advocacy organization that seeks to advance reproductive freedom as a fundamental human right. A key part of our mission is ensuring that women throughout the United States have meaningful access to high-quality, comprehensive reproductive health care services. As a part of that mission, we have litigated cases in North Dakota and all over the United States that secure the rights of women to access reproductive healthcare, including safe and legal abortions. Notably, we have represented Red River Women's Clinic, the sole abortion clinic in the state, in multiple lawsuits against the State of North Dakota relating to restrictions on abortion and are currently engaged in litigation involving SB 1297 passed in 2011, which has been enjoined by a court pending trial.¹ The bills before you are the most extreme, unconstitutional and harmful legislation considered in North Dakota since *Roe v. Wade*. We urge you to carefully consider the implications of each of these bills and to reject them all.

¹ *MKB M'gmt Corp. v. Burdick*, No. 09-2011-CV-02205, 2012 WL 1360641 (Cass Cty., N.D. Dist. Ct. Feb. 16, 2012).

I. HB 1456 Is an Unconstitutional Ban on Abortion

HB 1456 is blatantly unconstitutional and would be one of the most extreme abortion laws passed in this country since *Roe v. Wade* was decided by the Supreme Court in 1973.² This bill makes it a crime to provide an abortion in North Dakota after a heartbeat can be detected, which is approximately six weeks of pregnancy,³ with exceptions only to save the life of a woman, or in certain, narrowly defined medical emergencies. By banning abortion so early in pregnancy, this bill would prevent almost all pregnant women in North Dakota from making the basic and fundamental decision about whether to parent a child, choose adoption, or terminate a pregnancy.

Abortion is one of the most common surgical procedures sought by women in America. In fact, by the age of forty-five, approximately one in three women in this country will have had an abortion.⁴ Women seeking abortions come from all social, economic, and cultural backgrounds; most are mothers and more than half identify as religious.⁵ Women seek abortions for many reasons: some choose to terminate unwanted pregnancies, while other women with wanted pregnancies ultimately seek abortions to protect their own health, to allow them to seek critical and sometimes life-saving medical treatment such as chemotherapy, or because of a diagnosis of a serious fetal anomaly.

For forty years, the U.S. Supreme Court has recognized that the rights to liberty and privacy as protected by the United States Constitution extend to individuals' right to choose when and whether to have children.⁶ Twenty years ago, Justice Sandra Day O'Connor wrote in *Planned Parenthood v. Casey*: "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."⁷

² Earlier this month, Arkansas's legislature enacted a bill banning abortion at twelve weeks. The Governor of Arkansas vetoed the bill, stating "because [the bill] would impose a ban on a woman's right to choose an elective, nontherapeutic abortion well before viability, [the bill] blatantly contradicts the United States Constitution." Press Release, Governor Beebe Vetoes Senate Bill 134, http://governor.arkansas.gov/newsroom/index.php?do:newsDetail=1&news_id=3800 (last visited Mar. 14, 2013). Although the Arkansas legislature overrode the Governor's veto, the Center for Reproductive Rights and the ACLU of Arkansas have declared our intention to litigate this case and even those who are opposed to abortion acknowledge that the law is almost certain to be struck down in court. See, e.g., Erik Eckholm, *Arkansas Adopts A 12-Week Limit For Abortions*, N.Y. TIMES, Mar. 7, 2013, at A1, available at <http://www.nytimes.com/2013/03/07/us/arkansas-adopts-restrictive-abortion-law.html?pagewanted=all>.

³ See, e.g., Erik Eckholm, *Bill in North Dakota Bans Abortion After Heartbeat Is Found*, N.Y. TIMES, Mar. 15, 2013, available at http://www.nytimes.com/2013/03/16/us/north-dakota-approves-bill-to-ban-abortions-after-heartbeat-is-found.html?_r=0.

⁴ Guttmacher Institute, *An Overview of Abortion in the United States*, <http://www.guttmacher.org/media/presskits/2008/01/12/abortionoverview.html> (last visited April 18, 2012).

⁵ Guttmacher Institute, *Facts on Induced Abortion in the United States 2011*, http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited February 11, 2013).

⁶ See *Carey v. Pop. Servs. Int'l*, 431 U.S. 678, 685 (1977); accord *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

⁷ *Casey*, 505 U.S. at 854.

Specifically, the Court has repeatedly held that the Constitution prohibits a state from enacting a law that bans abortion prior to the point in pregnancy when a fetus is viable.⁸ As the Supreme Court has emphasized, “viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”⁹ The Supreme Court has never wavered from this position, despite numerous opportunities to do so.¹⁰ By completely banning abortions at the earliest stages of pregnancy, HB 1456 wholly conflicts with all U.S. Supreme Court precedent on abortion.

Moreover, HB 1456 would violate the United States Constitution both because it bans abortion long before the state has the right to do so and because it fails to adequately protect women’s health either before or after viability. House Bill 1456 contains an extremely narrow “medical emergency exception” for abortions after approximately six weeks, permitting them only when an abortion is necessary to avert death or a “serious risk of substantial and irreversible impairment of a major bodily function.” The Supreme Court has made it clear that no state may ban abortion prior to viability, regardless of the exceptions included in the law.¹¹ Further, since recognizing the constitutional right to choose an abortion, the Supreme Court has consistently held that even though a state may ban abortion *after* viability, any such ban must make an exception when an abortion “is necessary, in appropriate medical judgment, for the preservation of the life *or health*” of the woman.¹² The Court has never upheld a “health exception” as narrow as that contained in this bill. This exception would not adequately allow physicians to exercise their medical judgment to protect women’s health even after viability, and is both an unconstitutional and extremely harmful policy.

II. House Bill 1305 Would Harm Women and Families and is Unconstitutional

House Bill 1305 polices women’s reasons for seeking abortions and prohibits abortions in some cases. Specifically, the bill would prohibit a physician from performing an abortion under the threat of criminal penalties if he or she believes that the patient is seeking the abortion because of a diagnosis of genetic anomaly or because of the sex of the fetus. Although the bill purports to combat discrimination on the basis of sex and disability, in reality it is nothing more than a cynical exploitation of these serious societal problems to mask attempts to diminish the rights of women to control their reproductive lives.

Gender-based discrimination is a deeply rooted societal problem. Where it exists, it should be condemned and addressed by both governments and private actors. The Center for

⁸ See *Roe*, 410 U.S. at 163-64; *Casey*, 505 U.S. at 860, 879.

⁹ *Casey*, 505 U.S. at 860, 870 (“We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.”)

¹⁰ In *Gonzales v. Carhart*, the most recent Supreme Court case on abortion, the law at issue did not ban abortions in general or abortions at any particular point in pregnancy. 550 U.S. 124 (2007). Rather, it banned only *one abortion procedure*. Although the Supreme Court upheld that law, the Court emphasized that safe alternative abortion procedures were available at all times and in all cases and explained that its decision was fully consistent with past precedent. *Id.* at 163-64.

¹¹ *Casey*, 505 U.S. at 879 (“Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”).

¹² *Roe*, 410 U.S. at 165; *Casey*, 505 U.S. at 879 (quoting *Roe*, same).

Reproductive Rights has worked for years to advance women's status as equal participants in society, and to protect women's fundamental rights, such as the rights to health, self-determination and dignity. We have a long track record of advocacy and litigation supporting successful policies remedying discrimination against women and improving the social standing of girls. The evidence, however, shows that bans on sex selective abortion are both inappropriate and ineffective policy. They do not remedy the core problem of discrimination against women and girls, and they threaten the health and human rights of women by creating additional barriers to obtaining legal abortions.

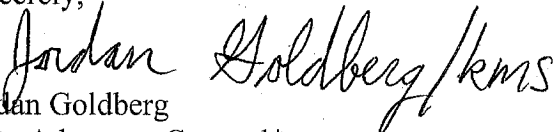
Moreover, HB 1305 also bans abortions sought because the woman has learned that the fetus has a genetic anomaly, including fatal impairments. When a woman receives this information, it is important that she, her family and her doctor have every medical option available to make decisions appropriate to their family's needs and circumstances. This bill is not aimed at nor would it remedy the serious discrimination confronting people with disabilities. The Center supports tools that have demonstrated effectiveness in combating inequality and remedying discrimination against people with disabilities in areas of health, employment, education and public life. This bill would do nothing to further those goals – instead, it is a callous and politically underhanded means of restricting access to reproductive healthcare. Restricting the grounds for legal abortion violates women's rights and distracts from the government's obligation to address the profound inequality and discrimination that exist in our society against people with disabilities.

Furthermore, HB 1305 is unconstitutional. The United States Supreme Court has explained that until viability, there is *no* state interest compelling enough to justify preventing a woman from making the ultimate decision to terminate her pregnancy.¹³ By banning abortions sought for a particular reason, this bill violates the fundamental protections for privacy and liberty found in the United States Constitution.

III. Conclusion

HB 1456 is an unconstitutional ban on abortion in the very earliest stage of pregnancy. The bill disregards women's fundamental right to determine when and whether to have children, poses a serious risk to women's health, and prohibits physicians from practicing medicine within the bounds of medical ethics and standards. HB 1305 would police women's reasons for seeking abortion and would unconstitutionally prevent women from obtaining abortions for certain reasons. We urge you to veto both of these bills. Please do not hesitate to contact us if you would like further information.

Sincerely,



Jordan Goldberg

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United States Legal Program

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¹³ *Casey*, 505 U.S. at 879.